2014

State of Utah, Plaintiff/Appellee, v. Darryl Kenneth Bossert, Defendant/Appellant

Utah Court of Appeals

Case No. 20130842-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DARRYL KENNETH BOSSERT,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of endangerment of a child, third degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Elizabeth Hruby-Mills presiding

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of endangerment of a child, third degree felonies. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2012).

INTRODUCTION

The issue in this case is whether a father can avoid responsibility for his 10-year-old child's use of methamphetamine and marijuana merely because he was sleeping when his child helped himself to his drug supply. When the father is awake, he routinely gives his child marijuana, uses methamphetamine and marijuana in front of him, allows his friends to use these drugs in front of his child, leaves paraphernalia lying out in the open, and keeps the drugs where his child can easily find and access them.

STATEMENT OF THE ISSUES

1. Did the trial court correctly deny Father's motion for a directed verdict where there was sufficient evidence to establish that Father intentionally or knowingly caused or permitted 10-year-old Son to be exposed to, ingest, or inhale controlled substances and drug paraphernalia?

Standard of Review for Issue 1. When reviewing a claim of insufficient evidence, an appellate court "will uphold the trial court's denial of a motion for directed verdict . . . if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Harrison*, 2012 UT App 261, ¶10, 286 P.3d 1272, *cert. denied*, 298 P.3d 69 (Utah 2013) (alterations, citation, and internal quotation marks omitted) (quoting *State v. Montoya*, 2004 UT 5, ¶29, 84 P.3d 1183).

2. Following Father's conviction of two counts of child endangerment, Father moved to arrest the judgment, alleging that one of the State's witnesses had gone into the jury room during deliberations. Father submitted four affidavits in support of his motion, but none of the affiants saw or heard the State's witness go into the jury room. The State

submitted a counter affidavit where the witness denied going into the jury room.

Did the trial court properly deny Father's motion to arrest judgment when he presented no evidence that a State witness had any contact with the jury?

Standard of Review for Issue 2. "We review a trial court's ruling on a motion [to arrest judgment] under an abuse of discretion standard. At the same time, however, we review . . . the trial court's factual findings for clear error." *State v. Billingsley*, 2013 UT 17, ¶9, 311 P.3d 995 (alterations in original and internal quotation marks omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

- Utah Code Ann. § 76-2-103 (West Supp. 2012) (Culpable mental state definitions)
- Utah Code Ann. § 76-5-112.5 (West Supp. 2013) (Endangerment of a child)
- Utah R. Crim. P. 4 (Prosecution of Public Offenses)
- Utah R. App. P. 24 (Briefs)

STATEMENT OF THE CASE

A. Summary of facts.[1]

"I thought it would be cool if I did it."

In February 2012, ten-year-old "Son" was living with the defendant, his "Father." R.175:9-10, 11. Although they were the only two who lived there, Father's many friends and girlfriends frequented the home. R.175:10-14.

"[A]lmost everybody that came over to [the] house" used drugs, including Father, Father's friends, and girlfriends. R.175:12-13. They favored marijuana and methamphetamine and would use these drugs in front of Son. R.175:12-14. Son discussed the drugs with Father and Father's friends, and asked them questions such as what meth "smelled like and what meth also looked like when they were breathing it out." R.175:14. Father answered Son's questions. R.175:14. But Father did not tell Son about the dangers of drugs or what they could do to his body. R.175:27-28.

Father also sold meth from the home and Son "knew it." R.175:15.

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[1] Consistent with appellate standards, the facts are stated in the light most favorable to the jury's verdict and conflicting evidence is presented only as needed to understand the issues raised on appeal. *See State v. Kruger*, 2000 UT 60, ¶ 2, 6 P.3d 1116.

Son likewise used drugs with Father's consent. Father gave Son marijuana at least 25 to 30 times. R.175:13. Father advised Son not to get caught with the drugs because it would get Father in trouble. R.175:25.

Father's friends also gave Son drugs and drug paraphernalia. R.175:15, 21, 53. Father's friend Shane gave Son meth and a "red mushroom pipe." R.175:15, 21. Son tried the meth at least twice. R.175:15. He tried it "[b]ecause "I was curious and I wanted to know what it was like because I thought it would be cool if I did it." R.175:15-16. Using meth gave Son a "[g]ood feeling" and made him "feel cool." R.175:16.

Son told one of Father's friends that he was smoking meth. R.175:44-45. This friend informed Father of Son's meth use. *Id.* Father later "yelled" at Son for using meth. R.175:44-45, 52-53. But Father did not stop giving Son marijuana, did not stop using drugs in Son's presence, did not stop inviting drugs users to his home, did not remove drugs or drug paraphernalia from the home, and did not lock up his drugs or otherwise keep them where Son could not access them. R.175:17-20, 54.

On the evening of February 6, 2012, Father gave Son marijuana. R.175:54. Son did not go to bed that night, but instead stayed up all night. R.175:34. At about 3:00 or 4:00 a.m., Son decided that he wanted more drugs. R.175:17, 34. He found a meth pipe on a counter in the front room

and took it. R.175:20. Knowing there would be more drugs in Father's room, Son went there. R.175:17-18, 32, 34. Father was asleep in his bed with a "girlfriend," a woman Son did not know. R.175:18, 33. A lamp was on. R.175:33. Son "went straight to [a] drawer" in a bureau by Father's bed "[b]ecause I knew that he would have it" there. R.175:17, 34. Son found marijuana in a container in the drawer. R.175:17-18. Son also found meth on a lid to a container in the drawer. R.175:18-19, 34. Son took both drugs. R.175:19-20, 35.

Son also looked inside the girlfriend's purse lying on the floor in front of the bed. R.175:18, 32, 36. Inside, Son found marijuana, meth, and a meth pipe, which he also took. R.175:18, 20, 38-39. He did not think it was wrong to take them. R.175:41.

Son then took the meth pipes and all the drugs back to his bedroom. R.175:19, 42-43. Using the meth pipe from the girlfriend's purse, Son smoked some of the meth. R.175:19, 43. Carefully holding a lighter to the pipe, Son took care not to burn the bottom. R.175:20-21. Son then smoked some of the marijuana, using the "red mushroom pipe" that Father's friend Shane had given him. R.175:15, 21.

Son later walked to his elementary school for the school day. R.175:46. He took the red mushroom pipe, a lighter, the remaining

marijuana, and some tinfoil with him.[2] R.175:21-22, 46. On the way, Son smoked more marijuana. R.175:22. At school, he went into the second-grade bathroom and smoked yet more marijuana. R.175:22, 47.

The police responded to the elementary school after a second-grader smelled smoke in the bathroom. R.175:23, 47-48. The police took Son to the hospital where he tested positive for both meth and marijuana. R.175:26-27, 61-64; State's Ex.1. At the hospital, Son admitted to police that he had gotten the meth and marijuana from his home. R.175:27.

Father came to the hospital and was questioned by police. R.175:71. An officer noticed the strong aroma of marijuana coming from Father and asked him about his drug use. R.175:72. Father admitted that he had just smoked marijuana and that he uses meth as well. R.175:73. Father also admitted that it was possible that Son could have found marijuana and meth in his home. R.175:73-74.

B. Summary of proceedings.

Father was charged with two counts of endangerment of a child and the case went to trial. R.1-3, R.175. The statutory elements that the State was required to prove were that Father (1) knowingly or intentionally, (2) caused or permitted Son, (3) to be exposed to, to ingest or inhale, or to have

[2] Son did not testify where he got the tinfoil, but stated that he had found the lighter at a friend's house. R.175:43.

contact with a controlled substance or paraphernalia. *See* Utah Code Ann. § 76-5-112.5(2) (West Supp. 2012). The information alleged that the conduct for both counts occurred "on or about February 7, 2012." R.1-3.

Motion for directed verdict

At the close of the State's case, Father moved for a directed verdict on both counts. R.175:81. Father argued that the State had not met its burden on element two—"caused or permitted"—because the drugs were hidden in his drawer and in his girlfriend's purse. R.175:81-82. Father reasoned that because Son "was sneaking around trying not to wake up whoever was sleeping in the bed, [it] certainly shows he does not have permission to be doing what he was doing." R.175:83.

The State countered that the drugs "were exactly where [Son] knew they would be from watching the defendant use drugs and store his drugs in the past. That's a common sense definition of permitting." R.175:82.

The trial court denied Father's motion, finding "there has been sufficient evidence presented from which a jury accurately and reasonably could convict the defendant. . . ." R.175:84; R.128. (A copy of the arguments and the trial court's oral ruling, R.175:81-84, is attached at Addendum D).

The trial court submitted the case to the jury, which convicted Father on both counts. R.175:108.

Motion to arrest judgment

After trial, but before sentencing, Father moved to arrest judgment on the sole ground that one of the State's trial witnesses had improper contact with the jury. R.147-150.

Father submitted four affidavits from trial attendees who stated that they heard the bailiff tell a State's witness – the testifying officer – that the jury had a question for him. R.149, 152-156. (A copy of Father's motion and supporting affidavits is attached at Addendum E). The affidavits further stated that the officer then went with the bailiff through a door by the jury box. *Id.*, R.176:3.

The State submitted a counter affidavit from an investigator with the Salt Lake County District Attorney's Office. R.176:3, R.157-159. (A copy is attached at Addendum F). The investigator interviewed the testifying officer and the bailiff. R.157. Both denied to the investigator that the officer had any contact with the jury. R.157-159. The officer stated that "he had not spoken to any member of the jury in this case at any time." R.158. He explained that he had gone through the door by the jury box with the bailiff to check the status of a warrant at a court clerk's work station. *Id.* The bailiff had assisted the officer. *Id.*

The bailiff verified to the investigator that he had checked the status of a warrant at a clerk's work station. R.159. He further stated that he knew "for a certainty" that he did not allow the officer to speak with the jury. R.158. The bailiff declared he would never permit such contact because it violates the "rules of conduct." *Id.*

The investigator noted that Father's affidavits were from Father's family members who had been waiting in the courtroom while the jury deliberated.[3] R.157.

After reviewing the affidavits, the trial court asked whether Father wanted an evidentiary hearing. Father stated that he did not:

> The Court: I have received documents from both sides. Does any – do either party believe an evidentiary hearing or anything further is needed?
>
> [State]: No, your Honor.
>
> [Father's counsel]: No, your Honor. The Court received the affidavit submitted, I guess, two weeks ago?
>
> The Court: Yes, I've reviewed all that and I've received from the State as well.
>
> [Father's counsel]: So I would submit it on the motion I filed as well as the affidavits.
>
> The Court: All right. Thank you.

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[3] Father's presentence report also lists one of the affiants, Bianca Kinney, as Father's live-in fiancée. R.137.

R.176:3.

The trial court took judicial notice that the door indicated in Father's affidavits did not lead into the jury room, but into a hallway. R.176:3. Father did not object. *Id.* The court then denied Father's motion as lacking factual support:

> There is no evidence of contact between the witness and the jury, only evidence that the witness utilized the same door that the jury has used. So here, no evidence of unauthorized conduct is present. The witnesses who had direct personal knowledge testified that no contact between the [testifying officer] and the jury took place. . . . So the Court finds that there's no evidence of improper jury contact that was made, and so there's no presumption, prejudice attaching to that and as such I'm denying the motion.

R.176:4. (A copy of the trial court's oral ruling, R.176:3-4, is attached at Addendum G).

The court sentenced Father to two concurrent prison terms of zero-to-five years. R.176:8; R.160. Father timely appealed. R.168-169; R.170-172.

SUMMARY OF ARGUMENT

I: The trial court correctly denied Father's motion for a directed verdict because the evidence was more than sufficient to prove all the statutory elements of at least two counts of child endangerment: that Father knowingly or intentionally caused or permitted Son to be exposed to, to

ingest or inhale, or to have contact with drugs or paraphernalia. This evidence included that Father and his friends regularly used marijuana and meth in front of Son. Father gave Son marijuana 25 to 30 times—most recently on February 6, 2012. On February 7, 2012, only hours after Father's last gift of marijuana, Son found and took a meth pipe lying in plain view in the front room. Son then immediately went straight to Father's drawer—where he knew Father kept his drugs—and he took and smoked the marijuana and meth that he found there. At the same time, Son took and smoked marijuana and meth that he found in Father's girlfriend's purse. He also took and used a meth pipe that he found in the purse. This evidence was more than enough from which a reasonable jury could find that Father not only knew about Son's drug use, but encouraged and consented to it.

II: The trial court correctly denied Father's motion to arrest judgment where he presented no evidence that a State witness had contact with the jury. The only direct witnesses here—the officer and the bailiff—denied any contact with the jury. The affiants' statements of hearing the bailiff say that the jurors had a question for the officer did not establish that the officer responded by going into the jury room to speak with the jury. Any

inference that the officer did so was rebutted by both the officer's and bailiff's statements that no contact had occurred.

This Court should not consider Father's claim that the trial court incorrectly relied on hearsay in the State's affidavit because Father invited any error in the trial court considering it and he inadequately briefed this argument.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY DENIED FATHER'S MOTION FOR A DIRECTED VERDICT AND SUBMITTED THE CASE TO THE JURY

Father claims that the trial court wrongly denied his motion for a directed verdict because "[n]o evidence supported the charge that [he] knowingly or intentionally caused or permitted the son to be exposed to marijuana and meth." Br.Aplt. 9. Father specifically argues that the State failed to prove the second element—"caused or permitted"—because "no evidence established that [Father] consented expressly or formally to the son stealing from a houseguest's purse" and "no reasonable juror could have concluded that [Father] consented expressly or formally to the son being able to access drugs kept in a closed drawer in [Father]'s bedroom." Br.Aplt. 16-17, 21.

As shown below, the trial court properly exercised its duty to submit the case to the jury because the State presented more than sufficient evidence on each element of child endangerment.

A. The directed verdict standard.

When moving for a directed verdict at the close of the State's case, a defendant asserts that the State has produced evidence so lacking and unbelievable that the trial court cannot submit the case to the jury for consideration, but must instead direct judgment in the defendant's favor. *See State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992); *Black's Law Dictionary* (9th ed. 2009). When presented with a motion for a directed verdict, the trial court must therefore consider whether the State "has established a prima facie case against the defendant by producing believable evidence of all the elements of the crime charged." *State v. Montoya*, 2004 UT 5, ¶29, 84 P.3d 1183 (citation and internal quotation marks omitted). If the state has established a prima facie case, the trial court will submit the case to the jury for it to determine whether the defendant is guilty beyond a reasonable doubt. *Id.* at ¶33.

A prima facie case can be made from "any evidence, however slight or circumstantial," as long as it "tends to show the guilt of the crime charged. . . ." *Id.* at ¶33 (citation and internal quotation marks omitted).

When assessing the evidence, the trial court must view it, and all reasonable inferences therefrom, "in the light most favorable to the state." *Montoya*, 2004 UT 5, ¶29. The trial court moreover is "not permitted to weigh the evidence, but must only determine whether there is a question of material fact for the jury to consider." *Young v. Fire Ins. Exch.*, 2008 UT App 115, ¶34, 182 P.3d 911. *See also Montoya*, 2004 UT 5, ¶32 ("the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts." (internal quotation marks and citation omitted)).

Consequently, "[i]f there is any evidence, however slight or circumstantial, which tends to show the guilt of the crime charged . . . it is the trial court's duty to submit the case to the jury." *Montoya*, 2004 UT 5, ¶33 (citation and internal quotation marks omitted).

This is so even if the evidence is not "particularly persuasive." *Young*, 2008 UT App 115, ¶34. "[E]ven if a judge subjectively concludes, following the presentation of a the prosecution's case, that there is reasonable doubt as to the defendant's guilt, the judge is nevertheless obligated to submit the case to the jury if the evidence is sufficient that a reasonable jury could find the defendant guilty beyond a reasonable doubt." *State v. Clark*, 2001 UT 9, ¶13, 20 P.3d 300.

In other words, a trial court "is justified in granting a directed verdict only if, after examining all evidence in a light most favorable to the non-moving party, there is *no* competent evidence that would support a verdict in the non-moving party's favor." *Merino v. Albertson's, Inc.*, 1999 UT 14, ¶3, 975 P.2d 467 (emphasis added).

Thus, the trial court here could have granted Father's motion for a directed verdict only if it found that the State had presented no believable evidence that tended to show Father's guilt of the elements of child endangerment. *See Merino*, 1999 UT 14, ¶3; *Montoya*, 2004 UT 5, ¶33. Because the State presented competent evidence on all the statutory elements of child endangerment, the trial court properly denied Father's motion.

B. The statutory elements of child endangerment.

The elements of child endangerment as charged in this case were that Father: (1) knowingly or intentionally, (2) caused or permitted Son, (3) to be exposed to, to ingest or inhale, or to have contact with a controlled substance or paraphernalia. *See* Utah Code Ann. § 76-5-112.5(2) (West Supp. 2012). The information alleged that the conduct for both counts occurred "on or about February 7, 2012." R.1-3.

1. Knowingly or intentionally.

The first element of child endangerment requires "knowing" or "intentional" conduct. *See* Utah Code Ann. § 76-5-112.5(2) (West Supp. 2012). Utah statute defines the terms "knowingly" and "intentionally." *See* Utah Code Ann. § 76-2-103 (West Supp. 2012). A person acts "[k]nowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances." Utah Code Ann. § 76-2-103(2) (West Supp. 2012). Likewise, a person acts "knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.*

A person acts "[i]ntentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result." Utah Code Ann. § 76-2-103(1) (West Supp. 2012).

As will be discussed in Section C below, the State presented sufficient evidence in its case-in-chief to show that Father acted at least knowingly.

2. Caused or permitted.

The second element of child endangerment is "caused or permitted." Utah Code Ann. § 76-5-112.5(2) (West Supp. 2012). Utah statute does not

define the terms "caused" or "permitted." When a term is not defined, courts will "give effect to each term according to its ordinary and accepted meaning." *State v. Terwilliger*, 1999 UT App 337, ¶10, 992 P.2d 490. *See also State v. Holm*, 2006 UT 31, ¶16, 137 P.3d 726 (holding courts will "'give effect to each term according to its ordinary and accepted meaning'") (quoting *C.T. v. Johnson*, 1999 UT 35, ¶9, 977 P.2d 479)).

To determine the ordinary and accepted meaning of statutory terms, courts often look to the dictionary. *See, e.g., Terwilliger*, 1999 UT App 337, ¶11 (using Webster's Ninth New Collegiate Dictionary to determine ordinary and accepted meaning of "permit"); *State v. Masciantonio*, 850 P.2d 492, 494 (Utah 1993) (using Webster's Third International Dictionary to determine ordinary and accepted meaning of "receipt"); *State v. Holm*, 2006 UT 31, ¶19, 137 P.3d 726 (using Merriam-Webster's Collegiate Dictionary to determine ordinary and accepted meaning of "marry"); *State v. Gallegos*, 2007 UT 81, ¶13, 171 P.3d 426 (using Black's Law Dictionary to determine ordinary and accepted meaning of "expose").

"In addition, [courts] construe the statute to give effect to legislative intent in so far as possible, and in doing so, assume the legislature used each term advisedly. . . ." *Masciantonio*, 850 P.2d at 493 (citation and internal quotation marks omitted).

The Merriam-Webster Online Dictionary defines "permit" as "to make possible" or "to give an opportunity." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/permit (last visited April 15, 2014). This Court has also defined "permit" in the analogous context of contributing to the delinquency of a minor as "active or knowing acquiescence." *Terwilliger*, 1999 UT App 337, ¶11.

The Merriam-Webster Online Dictionary defines "cause" as "something that brings about an effect or a result." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/cause (last visited April 14, 2014).

Despite the ordinary and accepted meanings of "cause" and "permit," Father argues for narrower, more limited definitions. *See* Br.Aplt.14-16. The jury instructions in this case provided that "'permit means to consent to expressly or formally'" and "caused" means "compel[ling] by command, authority, or force." R.107 (Jury Instr. 30) (attached at Addendum C). Father thus asserts that "permit" in this case can only mean "consenting to expressly or formally" and "caused" can only mean "compel[ling] by command, authority, or force." Br.Aplt.16.

These definitions are too narrow and do not control on this appeal. First, these crabbed definitions, – beyond being much narrower than the

terms' ordinary meanings – do not give effect to the legislative intent of the statute. In 2000, the Utah State Legislature passed the endangerment of a child statute to protect children from the dangers of drugs in their homes. *See* Stephen L. Nelson, Kort C. Prince, and Marjean Searcy, Families in Crisis, Challenges for Policymakers: *Examining the Troubled Lives of Drug-Endangered Children*, 36 Ohio N. U. L. Rev. 81, 81-82, 89-91 (2010). Meth has been "aptly described . . . as the most malignant, addictive drug known to mankind." *Id.* at 87. Methamphetamine use causes "substantial damage to the heart and brain cells and can result in serious physical disfigurement, hallucinations and delusions, and death." *Id.* Moreover, "[c]hildren exposed to methamphetamine suffer ear, eye, nose, and throat problems," are "at risk for pulmonary conditions," and can "absorb methamphetamine or toxic substances through their skin following contact with contaminated surfaces." *Id.* at 87-88. Children thus living in "drug endangered" homes "typically live in poverty and in dangerous and unhealthy home environments." *Id.* at 111.

Father thus got an unwarranted benefit when he received jury instructions that unduly narrowed the meaning of the statutory terms. But more importantly, those definitions do not control on this appeal because Father does not contest the sufficiency of the evidence to support the jury's

verdict. Instead, he contests only the trial court's denial of his motion for a directed verdict. *See* Br.Aplt.9-21. When Father moved for a directed verdict at the close of the State's case-in-chief, the jury instructions had not yet been given. R.175:81. And Father did not argue below that the trial court should limit its consideration of the statutory elements to the definitions later given in the jury instructions. Instead, Father argued that the *Terwilliger* case—which defined "permit" as "active or knowing acquiescence"—was relevant. R.175:83. Moreover, the prosecutor argued consistently with that definition that the drugs "were exactly where [Son] knew they would be from watching the defendant use drugs and store his drugs in the past. That's a common sense definition of permitting." R.175:82. The crabbed definitions in the jury instructions are thus irrelevant in analyzing whether the trial court properly denied Father's motion for a directed verdict and submitted the case to the jury.

But, in any event, as explained below in section C, the State presented sufficient evidence to show "cause or permit" under either the ordinary and accepted meanings of the terms or under Father's narrow, limited definitions: Father "caused or permitted" Son to be exposed to, to inhale, to ingest drugs or have contact with drug paraphernalia.

3. To be exposed to, to ingest or inhale, or to have contact with drugs or paraphernalia.

The third element of child endangerment is "to be exposed to, to ingest or inhale, or to have contact with drugs or paraphernalia." Utah Code Ann. § 76-5-112.5(2) (West Supp. 2012). The child endangerment statute defines "[e]xposed to" as "able to access or view an unlawfully possessed . . . controlled substance" or "has the reasonable capacity to access drug paraphernalia[.]" Utah Code Ann. § 76-5-112.5(1)(e) (West Supp. 2012). *See also Gallegos*, 2007 UT 81, ¶11 ("We conclude that for a child to be 'exposed to' . . . the child must have a reasonable capacity to actually access or get to the substances or paraphernalia or to be subject to its harmful effects, such as by inhalation or touching.").

The child endangerment statute does not define "ingest," "inhale," or "contact." But the Merriam-Webster Online Dictionary defines "ingest" as "to take into your body." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/ingest (last visited April 14, 2014). It defines "inhale" as "to breathe in." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/inhale (last visited April 14, 2014). It defines "contact" as "a state of touching." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/contact (last visited April 14, 2014).

As discussed in Section C, the State presented sufficient evidence under the third element as well.

C. The evidence was more than sufficient on each element of child endangerment for the trial court to send the case to the jury.

In its case-in-chief, the State presented sufficient, competent evidence that Father intentionally or knowingly caused or permitted Son to be exposed to, to ingest or inhale, or to come in contact with drugs or paraphernalia.

Below, Father did not argue to the trial court that the evidence was insufficient to show that Father did not know of Son's drug use or that Son was not exposed to drugs and paraphernalia. Rather, Father argued only that he did not intentionally or knowingly cause or permit Son to take the drugs from his drawer and his girlfriend's purse. *See* R.175:81-83. He reasoned that because Son "was sneaking around trying to wake up whoever was sleeping in bed, [it] certainly shows that he does not have permission to be doing what he was doing." R.175:81.

The trial court did not break Father's argument down, but generally found that the evidence was more than sufficient on both counts: "Based on the evidence present in the State's case in chief, I find that the State has met its burden and that there has been sufficient evidence presented from which

a jury accurately and reasonably could convict the defendant and so the motion is denied." R.175:83-84. As shown below, the trial court was correct.

1. The evidence showed Father acted knowingly or intentionally.

The State presented sufficient evidence to show that Father acted at least knowingly. As stated, a person acts "[k]nowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances." Utah Code Ann. § 76-2-103(2) (West Supp. 2012). Likewise, a person acts "knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.*

Here, Father not only knew of Son's drug use, but he encouraged and enabled it. He repeatedly gave Son marijuana. R.175:12-14, 19, 25, 42-45. Rather than discourage Son's use of marijuana, he warned him only not to get caught. R.175:25. Father and his friends openly used drugs in front of Son. R.175:12-14. Father and his friends left drugs and paraphernalia in plain view and where Son could easily access them. R.175:17-18, 20, 32, 34. Son testified that he knew where Father kept his drugs – an unlocked drawer in Father's room. R.175:17, 34. Father therefore knew that Son had

access to drugs and paraphernalia in the home. Indeed, when interviewed at the hospital, Father acknowledged that it was possible that Son could have found marijuana and meth in his home. R.175:73-74. Father was thus aware that his conduct was "reasonably certain to cause the result" of Son being able to access, see, touch, ingest, or inhale drugs or paraphernalia. *See* Utah Code Ann. § 76-5-112.5(2) (West Supp. 2012).

2. The evidence showed Father "caused or permitted."

The State further presented sufficient evidence on the element of "caused or permitted." Whether "caused or permitted" is defined in its ordinary and accepted meaning as "make possible," "give an opportunity," "knowing acquiescence," or "bring[ing] about an effect or a result" or in Father's narrow, limited definition of "consent[ing] to expressly or formally" or "compel[ling] by command, authority, or force," the State presented sufficient evidence on this element. *See* Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/permit; *Terwilliger*, 1999 UT App 337, ¶11 (defining "permit"); http://www.merriam-webster.com/dictionary/cause; Br.Aplt.12-16. The State presented evidence of "caused or permitted" in three ways.

First, drug use in the home was open, prevalent, and attractive to Son. "[A]lmost everybody that came over to [the] house" used meth and

marijuana. R.175:12-13. Father and his friends used drugs in front of Son. R.175:12-14. Son likely inhaled the smoke of the drugs used in front of him. And Son not only observed their use, but demonstrated his interest in the drugs by asking Father and his friends questions. R.175:14. Father answered Son's questions and discussed the drugs with him. R.175:14. Father, however, did not counsel Son about the dangers of drug use or explain what drugs can do to your body. R.175:27-28. Nor did he otherwise discourage Son from using drugs. Instead, Father regularly gave Son marijuana to use and told Son not to get caught so that Father would not get in trouble. R.175:25.

And Father knew Son wanted to – and did – try the drugs he saw Father and his friends using. Son demonstrated his interest by asking Father and his friends questions and discussing the drugs with them. R.175:14. Son testified that he tried meth because he was "curious and [] wanted to know what it was like because I thought it would be cool if I did it." R.175:15-16. Using the drugs gave Son a "[g]ood feeling" and "made [him] feel cool. . . ." R.175:16.

Indeed, Father encouraged Son to use drugs. As stated, Father repeatedly gave him marijuana. R.175:13. Shane gave him meth and a pipe. R.175:15, 21. Son testified that he did not feel guilty taking the drugs he

found in his Father's drawer or his girlfriend's purse. R.175:41. This is hardly surprising given Father's active encouragement of Son's marijuana use.

At a minimum, this amounted to Father's "express or formal consent" to Son being exposed to, to ingesting, inhaling, or coming in contact with drugs or paraphernalia.

Second, Father also provided an environment where Son had ready access to drugs and drug paraphernalia. Father and his friends gave Son drugs and modeled how to use them. R.175:13, 15, 21. They also left drugs and paraphernalia lying in plain view in the house. R.175:20. Furthermore Son observed how Father and his friends used the drugs. R.175:12-15. As a result, Son knew what meth and marijuana looked like, where they were kept in the house, and how to use them.

When Son went looking for drugs on February 7, he knew Father had drugs in his bureau drawer. He testified that he "went straight to his drawer" "[b]ecause [he] knew that [Father] would have it [there]. . . ." R.175:17, 34. Son quickly identified the drugs and took both meth and marijuana. R.175:18-19. And because "almost everybody" at the home used drugs, Son knew it was likely there would also be drugs in Father's girlfriend's purse. R.175:12.

Son also knew how to use the drugs. Son's testimony of how he smoked the meth and marijuana on February 7 – only hours after Father gave him marijuana – showed advanced knowledge. For example, he knew to put the meth in a meth pipe. R.175:20-21. He knew to use a lighter, how to hold the lighter, where to place it, and he knew that he should not burn the bottom of the pipe. *Id.* He also knew to use a different kind of pipe to smoke the marijuana. R.175:21.

Again, at a minimum, this amounts to Father's "express or formal consent" to Son being exposed to, to ingesting, inhaling, or coming in contact with drugs or paraphernalia.

Finally, despite Father's knowledge that Son was using drugs – including meth – Father did nothing to impede Son's access to them. Father's friend had told him that Son was using meth. R.175:44-45. Although Father yelled at Son for using it, he did nothing to block Son from accessing drugs in his home. R.175:44-45, 52-53. Instead, he kept his stash in a readily accessible place—his unlocked bureau drawer where Son knew he kept his drugs. Father continued to allow drug users in the home, even though these "friends" had given Son meth and drug paraphernalia. R.175:12-13, 15, 18, 21, 53. Father continued to allow these drugs users to smoke marijuana and meth in front of Son. R.175:12-14. Father even

continued to give Son drugs, giving him marijuana just hours before Son took Father's drugs. R.175:13, 54.

And Father continued to keep his drugs where Son knew where they were. R.175:17, 34. Father did not hide them. He did not lock them up. *Id.* Father also left drug paraphernalia lying out in the open – Son took a meth pipe from a counter in the front room on February 7, 2012. R.175:20.

Father likewise did not supervise Son. Son stayed up all night on February 6, 2012, and he smoked both marijuana and meth in his bedroom that night. R.175:19-21, 34, 42-43.

Based on this evidence, Father "made possible" and "gave [Son] an opportunity" to access, see, ingest, inhale, or come in contact with drugs or paraphernalia. He also "consented expressly or formally" to Son's access or use of drugs and paraphernalia. Consequently, under any definition, the State presented sufficient evidence on the element of "caused or permitted."

Case law supports this position. In *State v. Terwilliger* – which Father cited below – this Court considered whether the defendant had "permit[ted] a minor to consume an alcoholic beverage" under the contributing to the delinquency of a minor statute. 1999 UT App 337, ¶8 (quoting Utah Code Ann. § 78-3a-801(1)(d)(ii) (West Supp. 1999)). Defining "permit" as "active or knowing acquiescence," the *Terwilliger* court held that

"permit" requires "some measure of control or participation. . . ." *Id.* at ¶11. Thus, a defendant cannot merely "see[] others violate the law[,]" but must contribute in some way by "ha[ving] some measure of control over the minors' consumption of alcohol." *Id.* at ¶12.

This Court reversed Terwilliger's conviction because the trial court had made no finding indicating that the defendant had any control over the minors' consumption.[4] *Id.* The only evidence was that the drinking occurred at a party at an outdoor lake at which Terwilliger was also present. *Id.* at ¶¶2-4, 12. There was no evidence of the relationship between the parties or whether the defendant had provided the alcohol. *Id.*

In contrast, Father here "had some measure of control" over Son's exposure to drugs and paraphernalia. *Id.* at ¶12. Son was his child, whom he had a right and legal duty to supervise and control. Son's exposure occurred in Father's home. Father had control of whom and what was brought into the home. Indeed, the drugs and paraphernalia were either Father's or his friends'– whom he had invited into his home. Thus, *Terwilliger* supports the conclusion that Father "permitted" Son to be exposed to the drugs.

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[4] The *Terwilliger* court named defendant an "adult minor," someone who is between the ages of 18 and 21. 1999 UT App 337, ¶3 & n.1. The minors in the case were under 18. *Id.*

This conclusion is also supported by *State v. Wheeler*, 2005 UT App 255U. There, a father was convicted of contributing to the delinquency of his minor son, when the son twice visited his father instead of going to school as required by an agreement with Youth Corrections. *Id.* at *1. This Court affirmed Wheeler's conviction for "knowingly caus[ing]" his son's delinquency. *Id.* This Court found that the "evidence reflects that Wheeler knew or should have known that by allowing the two separate visits . . . he caused or encouraged the son to violate the agreement with Youth Corrections." *Id.* at *2. Likewise, Father here "caused" Son's exposure to the drugs and paraphernalia because Father "knew or should have known" that Son had access to the drugs and was influenced to use them by Father. *Id.*

The evidence was thus sufficient under the element of "caused or permitted" to submit the case to the jury.

3. The evidence showed Son was exposed to, ingested or inhaled drugs or had contact with drugs or paraphernalia.

The State also presented sufficient evidence that Son was exposed to, ingested or inhaled drugs, or had contact with drugs or paraphernalia. *See* Utah Code Ann. § 76-5-112.5(1)(e) (West Supp. 2012); *Gallegos*, 2007 UT 81, ¶11. Indeed, Son "ingested" or "inhaled both marijuana and meth because he tested positive for both drugs. R.175:26-27, 61-64, State's Ex.1. He also

had "contact" with drug paraphernalia because he touched and took meth pipes from the counter and the girlfriend's purse. R.20, 18, 20, 38-39.

Son was also "exposed to" drugs or paraphernalia in the home because he could see or "reasonably access" them. *See* R:175.12-13, 17, 20, 34. Again, Father gave him drugs; Father and his friends used drugs in front of Son; they left paraphernalia out in the open; and Father kept his drugs in an unlocked dresser drawer where Son knew they were kept. *Id.* This evidence is sufficient to submit to the jury that Son was exposed to, ingested or inhaled drugs, or had contact with drug paraphernalia.

In sum, the State presented sufficient, competent evidence to establish a prima facie case that Father knowingly or intentionally caused or permitted Son to be exposed to, to ingest or inhale, or to come in contact with drugs or paraphernalia.

4. Father incorrectly attempts to limit the evidence in this case.

Father argues that the evidence on directed verdit is limited to what occurred on February 7, 2012, and to the drugs that Son found in Father's drawer and in his girlfriend's purse. *See* Br.Aplt.n.3, 11. Father's argument is misplaced.

Father first attempts to limit the evidence on directed verdict to the date of February 7. The information alleged that the conduct for both

counts of child endangerment occurred "on or about February 7, 2012." R.1-3. But the alleged date of February 7 is not an element that the State was required to prove. Indeed, by court rule, the State need not even allege the date of an offense. Utah R. Crim. P. 4(b) (although charging document must set forth offense charged, "[s]uch things as time . . . need not be alleged unless necessary to charge the offense.").

And where the language "on or about" is used, the State is not required to prove exact fulfillment of that date. *See State v. Fulton*, 742 P.2d 1208, 1213 (Utah 1987) (citations omitted) (holding that State does not have "burden to prove the precise date of the act"). *Accord State v. Distefano*, 262 P. 113, 116 (Utah 1927); *State v. Wilkinson*, 612 P.2d 362, 365-366 (Utah 1980); *State v. Wilcox*, 808 P.2d 1028, 1033 (Utah 1991). Courts will therefore uphold several days' variance between the date charged and that proved at trial. *See, e.g., State v. Cooper*, 201 P.2d 764, 769-70 (1949) (permitting ten-day variance); *State v. Wadman*, 580 P.2d 235, 236-237 (Utah 1978) (permitting three-day variance); *State v. Fulton*, 742 P.2d 1208, 1216 (Utah 1987) ("Our previous cases have permitted a one- to four-day variance where the approximation 'on or about' is used"). Thus, "[i]t is sufficient that the evidence shows that the crime was committed on a date which closely [ap]proximates the date charged in the petition." *In re R.G.B.*, 597 P.2d 1333,

1335 (Utah 1979). *See also State v. Middelstadt*, 579 P.2d 908, 910 (Utah 1978) ("It is sufficient if the evidence shows that the crime occurred on a day that closely [ap]proximates the day alleged in the complaint"); *State v. Lairby*, 699 P.2d 1187, n.4 (Utah 1984) (finding that trial court incorrectly sustained defense counsel's objections regarding specific dates of criminal acts where information recited language "on or around").

Consequently, the evidence that Father repeatedly gave Son marijuana—most recently on the evening of February 6, 2012—closely "[ap]proximates the day alleged" and could properly be considered by the trial court when considering Father's motion for a directed verdict. *In re R.G.B.*, 597 P.2d at 1335.

Father also argues that the evidence in this case is limited to the drugs that Son found in Father's drawer and in his girlfriend's purse. *See* Br.Aplt.17-21 (arguing that State did not prove Father caused or permitted Son to access drugs in drawer or purse).Father reasons that the jury was instructed that "'Count I pertains to the allegation of marijuana exposure, and Count 2 pertains to the allegation of methamphetamine exposure.'" Br.Aplt.n.3 (quoting R.175:106-107.). But this is not the only evidence that the State presented in its case-in-chief. Indeed, Son testified that Father regularly gave him marijuana, most recently on February 6, 2012. R.175:54.

He also testified that he found a meth pipe lying in plain view on the front room counter on February 7, 2012. R.175:20. But even if the two counts are based on the drugs taken from the drawer and/or purse, the evidence was more than sufficient for the trial court to exercise its duty to send the case to the jury. Father argues that he had not given his express permission to get into his drawer on this particular occasion. Whether or not Father consented to Son's taking drugs and paraphernalia from the purse, Son found both marijuana and meth in Father's drawer. Thus, both counts could be based on the drugs in Father's drawer alone. Given Father's pattern of conduct which sent the clear message to Son that he had consented to his use and exposure to drugs – and there can be no dispute that he consented to Son's access to those drugs in his drawer. Father created an atmosphere where drugs and paraphernalia were throughout the house where Son could both see and access them, Father gave his Son drugs to use, encouraging him only not to get caught. All of these facts bespeak that Father knew that his conduct was reasonably certain to result in Son's getting into Father's drugs and paraphernalia, including his girlfriend's purse sitting out where Son could get it.

In sum, the trial court properly denied Father's motion for a directed verdict. Father has failed to show—and cannot show—that the State

presented no believable evidence that tended to show Father's guilt of the elements of child endangerment. *See Merino*, 1999 UT 14, ¶3; *Montoya*, 2004 UT 5, ¶33. The trial court consequently properly exercised its duty to submit the case to the jury.

II.

THE TRIAL COURT CORRECTLY DENIED FATHER'S MOTION TO ARREST JUDGMENT WHERE HE PRESENTED NO EVIDENCE THAT A STATE WITNESS HAD ANY CONTACT WITH THE JURY

Father next argues that the trial court erred when it denied his motion to arrest judgment. Br.Aplt. 21-24. Father claims that the trial court "disregarded" "persuasive evidence" of improper contact between the testifying officer and the jury where "each affidavit [had a] clear reference to hearing the bailiff tell the officer the jury had a question." *Id.* at 23. The trial court properly denied Father's motion because he did not present any evidence of contact between the officer and the jury.

"The rule in this jurisdiction is that improper juror contact with witnesses or parties raises a rebuttable presumption of prejudice." *State v. Pike*, 712 P.2d 277, 280 (Utah 1985). This presumption arises when there is any "unauthorized contact . . . which goes beyond a mere incidental, unintended, and brief contact." *Id.* If the State does not rebut the presumption, the court will reverse the defendant's conviction. *See State v.*

Erickson, 749 P.2d 620, 621 (Utah 1987) (reversing defendant's conviction where key State witness had five-minute conversation with juror during recess).

But where there is no persuasive evidence of contact between a juror and a witness, no presumption arises and the defendant's conviction must stand. *State v. Cardall*, 1999 UT 51 ¶22, 982 P.2d 79 (finding defendant "has failed to produce any evidence which would raise a presumption of prejudice which the State must rebut."). *See also State v. Burk*, 839 P.2d 880, 886 (Utah App. 1992) (upholding trial court's denial of motion for new trial where defendant alleged, but could not show, improper contact between jury and witness).

Here, Father presented no evidence showing any contact between the officer and the jury. *See Cardall*, 1999 UT 51, ¶22 (finding defendant failed to produce evidence of contact between jury and witness). Father's affidavits were from persons who did not see any contact. Rather, the affiants witnessed the officer and the bailiff walk through the door near the jury box. They merely surmised that the bailiff took the officer to see the jurors. But, as the trial court noted, this door did not lead into the jury room, but into a hallway. R.176:3 (taking "judicial notice that this door, the one near the jury box, does not lead into a jury room; it leads into a hallway.").

Father's affiants did not see the officer speak with the jury. R.152-156. Nor did they hear the officer speak with the jury. *Id. Compare Pike,* 712 P.2d at 280 (finding improper juror contact where witness testified to hearing conversation between officer and juror and officer testified to having conversation with juror).

The only direct witnesses here — the officer and the bailiff — denied any contact with the jury. The officer told the State's investigator that "he had not spoken to any member of the jury in this case at any time." R.158. The bailiff also stated that he knew "for a certainty" that he did not allow the officer to speak with the jury because doing so would violate the "rules of conduct." R.158. The officer and bailiff further stated that they used the door by the jury box only to access a computer to check the status of a warrant. R.158-159. As a result, Father has not presented any evidence of contact between the officer and the jury.

Moreover, the affiants' statements of hearing the bailiff say that the jurors had a question for the officer does not establish that the officer responded by going into the jury room to speak with the jury. Any inference that the officer did so was rebutted by both the officer's and bailiff's statements that no contact had occurred.

This case is like *State v. Estes*, 176 P. 271 (Utah 1918). There, the defendant filed affidavits from witnesses who claimed that two jury members had conversed with a witness. *Id.* at 275. The State, however, filed affidavits from the two jury members and the witness in question. *Id.* The State's affidavits "dissipated the possible inference" of contact between them. *Id.* Upon review, the Utah Supreme Court found that "if the [trial] court believed the affidavits of the jurors and those of the other persons made on behalf of the state, it had no alternative save to deny the motion for a new trial upon that ground." *Id.*

So too here. "[I]f the [trial] court believed the affidavit[]" of the State, "it had no alternative save to deny the motion" to arrest judgment. *Id.*

Indeed, appellate courts should give "'just deference" to such determinations "because of the advantaged position of the trial judge" to assess "events occurring in the court room." *Cardall*, 1999 UT 51, ¶20 (internal quotation and citation omitted). The trial court here was in the "advantaged position" to assess "the events occurring in the court room." *Cardall*, 1999 UT 51, ¶20. Indeed, the trial court here was familiar with the bailiff and the bailiff's rules of conduct. The trial court saw the officer testify at trial. The trial court also likely observed Father's affiants—Father's family members—during the trial. R.137, 157. Consequently, the

trial court properly denied Father's motion and this Court should give "just deference" to the trial court's "advantaged position" to assess "the events occurring in the court room." *Cardall*, 1999 UT 51, ¶22.

Father also claims that the "court clearly erred when it relied on unsworn hearsay" of the bailiff and the officer in the State investigator's affidavit opposing Father's motion. Br.Aplt. 24. But this Court should not consider this claim because Father invited any error in the trial court's considering the State's affidavit and he has inadequately briefed this claim.

First, Father invited any error in the trial court's considering the State's affidavit. The invited error doctrine provides that "where a party makes an affirmative representation encouraging the court to proceed without further consideration of an issue, an appellate court need not consider the party's objections to that action on appeal." *State v. Moa*, 2012 UT 28, ¶27, 282 P.3d 985. *See also State v. Maese*, 2010 UT App 106 ¶10, 236 P.3d 155 (holding defendant was precluded from asserting that trial court erred in not ruling on his motion for a bill of particulars where he affirmatively stated he was ready to proceed with trial); *State v. Geukgeuzian*, 2004 UT 16, ¶12, 86 P.3d 742 (holding defendant invited error where he submitted erroneous jury instruction). Here, when asked, Father

affirmatively represented to the trial court that he did not want an evidentiary hearing:

> The Court: I have received documents from both sides. Does any – do either party believe an evidentiary hearing or anything further is needed?
>
> [State]: No, your Honor.
>
> [Father's counsel]: No, your Honor. The Court received the affidavit submitted, I guess, two weeks ago?
>
> The Court: Yes, I've reviewed all that and I've received from the State as well.
>
> [Father's counsel]: So I would submit it on the motion I filed as well as the affidavits.
>
> The Court: All right. Thank you.

R.176:3.

Because of Father's representation, the officer and bailiff – or jurors – were not called or questioned. *Compare Burk*, 839 P.2d at 886 (jurors questioned); *Pike*, 712 P.2d at 280 (jurors questioned); *Erickson*, 749 P.2d at 620 (officer and witness questioned in evidentiary hearing). Thus, any error was invited by Father and this Court should not consider this claim.

Second, Father inadequately briefed his assertion that the trial court erred when it considered hearsay in the State's affidavit. Besides the bald assertion that the trial court erred when it considered hearsay in the State's affidavit, Father presents no authority or analysis for this claim. This Court

should not consider it. *See* Utah R. App. P. 24(a)(9) (providing argument "shall contain the contention and reasons . . . with citations to the authorities, statues, and parts of the record relied on."); *State v. Garner*, 2002 UT App 234, ¶12, 52 P.3d 467 (refusing to address defendant's claims because "[R]ule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority."); *State v. Marquez*, 2002 UT App 127, ¶10, 54 P.3d 637 (refusing to address defendant's claims because they were devoid of any "meaningful analysis"); *Midvale City Corp. v. Haltom*, 2003 UT 26, ¶74, 73 P.3d 334 (finding that nominally alluding to provisions without analysis does not sufficiently raise issue to permit appellate consideration); *State v. Montoya*, 937 P.2d 145 (Utah App. 1997) (holding that reviewing court is not depository in which appellant may dump burden of research and argument).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on May 13, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 8,994 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

Tera J. Peterson

TERA J. PETERSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on May 13, 2014, two copies of the Brief of Appellee were

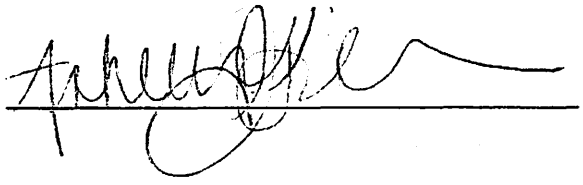
☐ mailed ☑ hand-delivered to:

Nathalie S. Skibine
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.



Addenda

Addendum A

§ 76-2-103. Definitions

A person engages in conduct:
(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.
(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

§ 76-5-112.5. Endangerment of a child or vulnerable adult

(1) As used in this section:
(a)(i) "Chemical substance" means:
(A) a substance intended to be used as a precursor in the manufacture of a controlled substance;
(B) a substance intended to be used in the manufacture of a controlled substance; or
(C) any fumes or by-product resulting from the manufacture of a controlled substance.
(ii) Intent under this Subsection (1)(a) may be demonstrated by:
(A) the use, quantity, or manner of storage of the substance; or
(B) the proximity of the substance to other precursors or to manufacturing equipment.
(b) "Child" means a human being who is under 18 years of age.
(c) "Controlled substance" is as defined in Section 58-37-2.
(d) "Drug paraphernalia" is as defined in Section 58-37a-3.
(e) "Exposed to" means that the child or vulnerable adult:
(i) is able to access or view an unlawfully possessed:
(A) controlled substance; or
(B) chemical substance;
(ii) has the reasonable capacity to access drug paraphernalia; or
(iii) is able to smell an odor produced during, or as a result of, the manufacture or production of a controlled substance.
(f) "Prescription" is as defined in Section 58-37-2.
(g) "Vulnerable adult" is as defined in Subsection 76-5-111(1).
(2) Unless a greater penalty is otherwise provided by law:
(a) except as provided in Subsection (2)(b) or (c), a person is guilty of a felony of the third degree if the person knowingly or intentionally causes or permits a child or a vulnerable adult to be exposed to, inhale, ingest, or have contact with a controlled substance, chemical substance, or drug paraphernalia;
(b) except as provided in Subsection (2)(c), a person is guilty of a felony of the second degree, if:
(i) the person engages in the conduct described in Subsection (2)(a); and
(ii) as a result of the conduct described in Subsection (2)(a), a child or a vulnerable adult suffers bodily injury, substantial bodily injury, or serious bodily injury; or
(c) a person is guilty of a felony of the first degree, if:
(i) the person engages in the conduct described in Subsection (2)(a); and
(ii) as a result of the conduct described in Subsection (2)(a), a child or a vulnerable adult dies.
(3) It is an affirmative defense to a violation of this section that the controlled substance:
(a) was obtained by lawful prescription; and
(b) is used or possessed by the person to whom it was lawfully prescribed.

(4) The penalties described in this section are separate from, and in addition to, the penalties and enhancements described in Title 58, Occupations and Professions.

Utah R. Crim P. 4. - Prosecution of Public Offenses

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.
(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.
(c) The court may strike any surplus or improper language from an indictment or information.
(d) The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced. If an additional or different offense is charged, the defendant has the right to a preliminary hearing on that offense as provided under these rules and any continuance as necessary to meet the amendment. The court may permit an indictment or information to be amended after the trial has commenced but before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.
(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.
(f) An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.
(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.
(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.
(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed.Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.
(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.

Utah R. App P. 24. - Briefs

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:
(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.
(a)(2) A table of contents, including the contents of the addendum, with page references.
(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.
(a)(4) A brief statement showing the jurisdiction of the appellate court.
(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and
(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or
(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.
(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.
(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.
(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.
(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.
(a)(10) A short conclusion stating the precise relief sought.
(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so

makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:
(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;
(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and
(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.
(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:
(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or
(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.
(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.
(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.
(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant toRule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.
(f) Length of briefs.
(f)(1) *Type-volume limitation.*

(f)(1)(A) A principal brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text; and a reply brief is acceptable if it contains no more than 7,000 words or it uses a monospaced face and contains no more than 650 lines of text.
(f)(1)(B) Headings, footnotes and quotations count toward the word and line limitations, but the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record as required by paragraph (a) of this rule do not count toward the word and line limitations.
(f)(1)(C) Certificate of compliance. A brief submitted under Rule 24(f)(1) must include a certificate by the attorney or an unrepresented party that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief.
(f)(2) *Page limitation.* Unless a brief complies with Rule 24(f)(1), a principal brief shall not exceed 30 pages, and a reply brief shall not exceed 15 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule.
In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.
(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs.
(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.
(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.
(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.
(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.
(g)(5) *Type-Volume Limitation.*
(g)(5)(A) The appellant's Brief of Appellant is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.
(g)(5)(B) The appellee's Brief of Appellee and Cross-Appellant is acceptable if it contains no more than 16,500 words or it uses a monospaced face and contains no more than 1,500 lines of text.

(g)(5)(C) The appellant's Reply Brief of Appellant and Brief of Cross-Appellee is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.
(g)(5)(D) The appellee's Reply Brief of Cross-Appellant is acceptable if it contains no more than half of the type volume specified in Rule 24(g)(5)(A).
(g)(6) *Certificate of Compliance.* A brief submitted under Rule 24(g)(5) must comply with Rule 24(f)(1)(C).
(g)(7) *Page Limitation.* Unless it complies with Rule 24(g)(5) and (6), the appellant's Brief of Appellant must not exceed 30 pages; the appellee's Brief of Appellee and Cross-Appellant, 35 pages; the appellant's Reply Brief of Appellant and Brief of Cross-Appellee, 30 pages; and the appellee's Reply Brief of Cross-Appellant, 15 pages.
(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the page, word, or line limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages, words, or lines requested, and the good cause for granting the motion. A motion filed at least seven days prior to the date the brief is due or seeking three or fewer additional pages, 1,400 or fewer additional words, or 130 or fewer lines of text need not be accompanied by a copy of the brief. A motion filed within seven days of the date the brief is due and seeking more than three additional pages, 1,400 additional words, or 130 lines of text shall be accompanied by a copy of the finished brief. If the motion is granted, the responding party is entitled to an equal number of additional pages, words, or lines without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.
(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.
(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within seven days of filing and shall be similarly limited.
(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be

disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Addendum B

INSTRUCTION NO. 25

Before you can convict the defendant, Darryl Kenneth Bossert of the offense of Endangerment of Child, as charged in Count 1 of the Information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1 That on or about February 7, 2012, in Salt Lake County, State of Utah;

2 The defendant, Darryl Kenneth Bossert;

3 Knowingly, or intentionally;

4 Caused or permitted a child;

5 To be exposed to, to ingest, to inhale, or to have contact with a controlled substance or drug paraphernalia.

If, after careful consideration of all of the evidence in this case you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Endangerment of Child, as charged in Count I of the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count I.

INSTRUCTION NO. 26

Before you can convict the defendant, Darryl Kenneth Bossert of the offense of Endangerment of Child, as charged in Count 2 of the Information, you must find from all of the evidence and beyond a reasonable doubt, each and every one of the following elements of that offense:

1 That on or about February 7, 2012, in Salt Lake County, State of Utah;

2 The defendant, Darryl Kenneth Bossert;

3 Knowingly, or intentionally;

4 Caused or permitted a child;

5 To be exposed to, to ingest, to inhale, or to have contact with a controlled substance or drug paraphernalia.

If, after careful consideration of all of the evidence in this case you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Endangerment of Child, as charged in Count 2 of the Information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty of Count 2.

Addendum C

INSTRUCTION NO. 30

"Cause" means to compel by command, authority, or force.

"Permit" means to consent to expressly or formally.

Addendum D

MR. HILLS: No, your Honor. The State rests.

THE COURT: All right. Thank you.

Mr. Hanseen.

MR. HANSEEN: Your Honor, I'd like to make a motion at the time, I'd ask outside the presence of the jury.

THE COURT: All right then. We have some discussion to take place. So you will be in a brief recess. And again the same admonitions apply, do not discuss the case with anyone, even each other, and we will reconvene shortly. Thank you.

THE BAILIFF: Please rise.

THE COURT: All right. You may be seated.

MR. HANSEEN: Your Honor, I would be making a motion for a directed verdict at this time, both Counts I and II. I would argue that the State has not proven that the case should go to a jury, at least on the element that Mr. Bossert intentionally or orally causes -- caused or permitted his child to be exposed to a controlled substance.

The evidence that was before the Court today was that the drugs were found hidden out of sight in a purse, in a drawer in the middle of the night.

The plain reading of the statute requires that the State prove that Mr. Bossert caused or permitted his son or a child or a vulnerable adult to expose them to these drugs. He neither caused nor permitted his son access to these drugs

specifically on or about February 7th, 2012.

There was testimony that maybe in the past there was some exposure to drugs, but on the date charged in the information, the State has not met its burden, and I would ask the Court for a motion for directed verdict.

THE COURT: All right. Thank you.

Mr. Hills.

MR. HILLS: Darryl Bossert Junior is not a small baby confined to a crib. The defendant, the testimony is, routinely smoked and used drugs in front of his son, had other people who did, told Detective Flores essentially it's possible that he found drugs laying around. And in fact, Darryl did. They weren't locked in a drawer. They were exactly where Darryl knew they would be from watching the defendant use drugs and store his drugs in the past. That's a common sense definition of permitting.

If you put something out there where a child is mobile enough, able to reach and get it and you, in fact, created a desire for this drug by giving drugs to your child in the past, that's the very definition of causing or permitting a child to have access to drugs.

THE COURT: Thank you. Mr. Hanseen.

MR. HANSEEN: Your Honor, finally, I think it comes down to what cause or permit means. Cause would be the stronger of the two definitions, as I defined it in the jury

instructions, compelling someone or commanding someone to do drugs. That's certainly not the case here.

I think what could be argued is that Mr. Bossert permitted his child to access these drugs. That is not what happened here.

In fact there was a case I found recently, it's State versus Terwilliger. And the facts of that case were, I think, somewhat similar here. An adult was with underage people that were drinking alcohol, and the Court of Appeals reversed the judge's decision on the bench trial in saying that permission needs to be something more expressed, more formal. You have to consent to it. Just being around underage children that you knew were, you know, drinking alcohol is not permitting them to do so.

I think the facts of this case are even stronger for that. There is no permission. In fact, Darryl Junior said that his dad, you know, at least during the meth was angered at him when he found out he was going to be smoking those drugs.

And specifically the night in question, there was certainly no permission. It was well-hidden. And Darryl Junior testified that to access it he had to, you know, sneak around. And if he was sneaking around trying not to wake up whoever was sleeping in the bed, certainly shows he does not have permission to be doing what he was doing.

THE COURT: All right. Thank you. Based on the

evidence presented in the State's case in chief, I find that the State has met its burden and that there has been sufficient evidence presented from which a jury accurately and reasonably could convict the defendant and so the motion is denied.

MR. HANSEEN: And your Honor, if I could just take one moment and consult with my client about his right to testify.

THE COURT: All right.

MR. HANSEEN: Can we do it before -- just one minute here?

THE COURT: Certainly.

MR. HANSEEN: Thank you.

MR. HILLS: I will go see if the child is --

THE COURT: All right. Thank you. We are in a brief recess.

(Recess taken by the court.)

THE COURT: We are back on the record outside the presence of the jury. All parties are present.

Mr. Hanseen.

MR. HANSEEN: Your Honor, I've advised Mr. Bossert of his right to testify at this jury trial. He's going to take my advice and choose not to testify. I would like to get that on the record.

I will be calling one witness. I'm recalling Darryl Junior.

Addendum E

SAMUEL J. HANSEEN (11826)
Salt Lake Legal Defender Association
424 East 500 South, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 532-5444

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY, Plaintiff, vs. DARRYL KENNETH BOSSERT, Defendant.	**MOTION TO ARREST JUDGEMENT** Case No. 121901450FS Judge HRUBY-MILLS

Defendant, DARRYL KENNETH BOSSERT by and through counsel, SAMUEL J. HANSEEN, hereby requests that this Court arrest judgment for good cause pursuant to Rule 23 of the Utah Rules of Criminal Procedure.

STATEMENT OF FACTS

Darryl Bossert was convicted of two counts of Endangerment of a Child by a jury on May 23, 2013. While the jury was deliberating multiple witnesses recall seeing the Court's bailiff approach plaintiff's counsel table. Sitting at that table was Detective Flores of the Salt Lake City Police Department. Detective Flores testified as a witness against Mr. Bossert earlier that day. Witnesses overheard the bailiff inform Detective Flores that the jury had a question for him. Witnesses then report watching both the bailiff and Detective Flores exit the court room

through the rear courtroom doors, the same doors the jury exited prior to their deliberation. Shortly after, the jury returned with a guilty verdict.

ARGUMENT

THE COURT SHOULD ARREST JUDGEMENT IN THIS CASE BECAUSE DEFENDANT WAS DENIED HIS RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT.

Utah Rule of Criminal Procedure 23 permits the Court to arrest judgment for good cause.

> At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

The Sixth Amendment of the Amendment of the U.S. Constitution mandates that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;." U.S. Const. amend. VI.

In State v. Pike, 712 P.2d 277, 280 (Utah 1985), the Utah Supreme Court reminds us that both the Utah and the United States Constitutions guarantee the accused a trial by an impartial jury. This is found in the 6th Amendment and 14th Amendments to the U.S. Constitution, and in Article I, Section 10 of the Utah Constitution. Anything more than the most incidental contact during the trial between witnesses and jurors serves to cast doubt upon the impartiality of the jury, or gives the appearance of the absence of impartiality. Some jurisdictions have held that incidental conversation between a juror and a witness does not fatally affect the impartiality of the jury, unless the defendant can show that actual prejudice may have resulted from the contact.

The Utah Supreme Court, however, has enunciated a somewhat more stringent rule in recognition of the fact that prejudice may well exist even though it is not provable and even though a person who has been tainted may not, himself, be able to recognize that fact. The Utah rule is that improper juror contact with a witness or a party to the case raises a rebuttable presumption of prejudice. Id. at 279-280.

The Court in Pike upheld the doctrine that says a rebuttable presumption of prejudice necessarily arises from any unauthorized contact during a trial between a witness, an attorney or any court personnel and members of the jury, when it goes beyond mere incidental, unintended, and brief contact. The possibility that improper contacts may influence a juror in ways he or she may not even be able to recognize and that a defendant may be left with questions as to the impartiality of the jury, and leads to the inevitable conclusion that when the contact is more than incidental, the burden is on the prosecution to prove that the unauthorized contact did not influence the juror. Id., at 280.

Applying the rule in Pike to the matter before the Court, witnesses in the courtroom will attest to viewing the Court's bailiff approach Detective Flores at plaintiff's counsel table. These witnesses will swear they overheard a conversation between the bailiff and the detective where the bailiff informs the detective that the jury has a question for him.[1] The bailiff and detective were witnessed exiting the rear doors of the courtroom, the same doors the jurors exited. A presumption has been raised that impermissible contact was made between the detective and the jurors.

The defendant has been left with questions as to the impartiality of the jury. The burden is

[1] Affidavits have been prepared for defendant's witnesses. Due to the limited time allowed for this memorandum the affidavits have not yet been signed. Defendant anticipates all of the affidavits will be signed by Monday August 12, 2013. An investigator for defendant attempted to contact members of the jury. The investigator has not yet received a response from the jury. Defendant will supplement this writing if contact is made.

now on the Prosecution to prove that the unauthorized contact did not influence the juror.

This raises the issue of fundamental fairness under the 6th and 14th Amendments to the U.S. Constitution, and Article 1, Section 10 of the Utah Constitution, guaranteeing the defendant the right to a trial by an impartial jury.

The Defendant argues that this was more than an incidental contact between a juror and a witness, and the result does in fact fatally affects the impartiality of the jury, since actual prejudice must result from this contact. The Utah Supreme Court has adopted a stringent rule, which says that prejudice may well exist even though it is not provable and even though a person who have been tainted may not, himself, be able to recognize that fact. The Utah rule is that improper juror contact with a witness or a party to the case raises a rebuttable presumption of prejudice, and such is the case in this instance.

The Court in Pike held that the Defendant had been denied the right to a trial by an impartial jury, and the appropriate remedy was to reverse the conviction, and remand the case for a new trial. Accordingly, the Defendant begs the Court to follow the precedent in Pike, and arrest judgment in this case.

DATED this 8 day of August, 2013.

SAMUEL J. HANSEEN
Attorney for Defendant

I hereby declare that I caused to be delivered a true and correct copy of the foregoing Defendant's Requested Jury Instructions, this 8 of August, 2013 to Blake Hills, attorney for plaintiff.

SAMUEL J. HANSEEN (11826)
Attorney for the Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite #300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. DARRYL KENNETH BOSSERT, Defendant.	**AFFIDAVIT OF TIFFANY LESLIE** Case No. 121901450FS Judge HRUBY-MILLS

Comes the affiant, Tiffany Leslie, being duly sworn, state the following under oath and certify the foregoing is true under the pains and penalties of perjury:

"I Tiffany Leslie heard the Bailiff call back the officer to the Jury for a question. The first time was during a break the Judge was not in the room. This happened a second time during deliberation he was called back to talk to the Jury again he said they have another question."

Tiffany Leslie
2905 West 4570 South, Apt. #112
West Valley City, UT 84119
801-558-7925

State of Utah)
) ss.
County of Salt Lake)

Subscribed and sworn before me this 12th day of August, 2013.

SHILPI CULMER
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 09/02/2013
Commission # 580160

NOTARY PUBLIC

SAMUEL J. HANSEEN (11826)
Attorney for the Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite #300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. DARRYL KENNETH BOSSERT, Defendant.	**AFFIDAVIT OF BIANCA KINNEY** Case No. 121901450FS Judge HRUBY-MILLS

Comes the affiant, Bianca Kinney, being duly sworn, state the following under oath and certify the foregoing is true under the pains and penalties of perjury:

"I witnessed the Judge Bailiff come into the court room and asked the arresting officer to come back to the Jury because 'they had a question for him' while the Jury was out deliberating while we were going to lunch."

Bianca Kinney

Bianca Kinney
150 West 7200 South, Apt #39
Midvale, UT 84047
Phone: 385-242-3503

State of Utah)
) ss.
County of Salt Lake)

Subscribed and sworn before me this 12th day of August, 2013.

NOTARY PUBLIC

SHILPI CULMER
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 09/02/2013
Commission # 580160

SAMUEL J. HANSEEN (11826)
Attorney for the Defendant
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Salt Lake City, Utah 84111
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. DARRYL KENNETH BOSSERT, Defendant.	**AFFIDAVIT OF VERONICA HOLLESTELLE** Case No. 121901450FS Judge HRUBY-MILLS

Comes the affiant, Veronica Hollestelle, being duly sworn, state the following under oath and certify the foregoing is true under the pains and penalties of perjury:

"I observed the Bailiff call Officer Flores to go back the Jury had a question. The Bailiff took Officer Flores through the closest door on the south side of the court room. He closed the door and was in there for quite a while."

Veronica Hollestelle
2905 West 4570 South, Apt. #111
West Valley City, UT 84119
801-920-0682

State of Utah)
) ss.
County of Salt Lake)

Subscribed and sworn before me this 12th day of August, 2013.

SHILPI CULMER
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 09/02/2013
Commission # 580160

NOTARY PUBLIC

SAMUEL J. HANSEEN (11826)
Attorney for the Defendant
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Salt Lake City, Utah 84111
Telephone: (801) 532-5444

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

THE STATE OF UTAH, Plaintiff, vs. DARRYL KENNETH BOSSERT, Defendant.	**AFFIDAVIT OF HANNA FARRELL AND CHRISTOPHER FARRELL** Case No. 121901450FS Judge HRUBY-MILLS

Comes the affiant, Hanna Farrell and Christopher Farrell, being duly sworn, state the following under oath and certify the foregoing is true under the pains and penalties of perjury:

"I saw and heard the guy in the brown uniform (officer) come out of the Jury room and asked the witness detective to come back there because the Jury had a question for him. He went to the Jury room and stayed there for a while."

Hanna Farrell
707 West Mackinac Drive, Apt #10M
Taylorsville, UT 84123
801-564-9691

Christopher Farrell
707 West Mackinac Drive, Apt #10M
Taylorsville, UT 84123
801-564-9691

State of Utah)
) ss.
County of Salt Lake)

Subscribed and sworn before me this 12 day of AUGUST, 2013.

NANCY M. DUNYON
Notary Public State of Utah
My Commission Expires on:
December 29, 2015
Comm. Number: 651407

NOTARY PUBLIC

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Addendum F

ORIGINAL

SIM GILL, BAR NO. 6389
District Attorney for Salt Lake County
BLAKE R. HILLS, Bar No. 8199
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

IN THE MATTER OF	)	AFFIDAVIT OF
STATE V. BOSSERT	)	CRAIG L. WATSON
	)	CASE NO. 121901450

Mills

STATE OF UTAH)
:ss.
County of Salt Lake)

I, CRAIG L. WATSON, being first duly sworn upon oath, depose and state as follows:

1. I am a(n) investigator for the Salt Lake County District Attorney's Office.

2. I am a Certified Police Officer in the State of Utah with over 26 years of expierence.

3. I have training and investigative experience in many types of criminal cases, including public corruption and misconduct by police.

4. On August 5, 2013 DDA Blake Hills requested inquiry into this matter.

5. At a sentencing hearing for defendant Darryl Bossert, on August 5, 2013, members of his family alleged to the court that his conviction was the result of the Bailiff in the case allowing the lead investigative officer to access and sway the jury during their deliberations after a May 13, 2013 trial.

6. On August 5, your affiant interviewed the lead detective on the case, Tom Flores (SLCPD). Tom stated he had not spoken to any member of the jury in this case at any time. Tom does not know, and has never met any of those seated as jurists in this case.

7. Tom stated he did go to one of the clerk's work stations with the bailiff to check the state record on Utah Criminal Justice Information System (UCJIS) to determine if the defendant had an outstanding warrant for his arrest. He recalled that there was a warrant for a domestic violence related charge. Tom said this occurred before a verdict in the case and may have been during jury deliberations, but Tom was not sure of the timing. Tom does not recall the name of the male bailiff who assisted him in checking the computer. He described him as tall and thin with brown hair and possibly in his mid 30's.

8. Through the court bailiff supervisor, Aaron Torres, your affiant was able to learn which bailiff was in charge of the jury for the subject case. Aaron identified Steve Adams.

9. Your affiant interviewed Steve on August 7. Initially Steve was not sure of which case your affiant was referring to, but with some cognitive clues he was able to recall general information about the case. Steve stated that he did not allow anyone to speak to the jury as they deliberated; he knows this for a certainty, because it would violate the rules of conduct and he has never allowed such activity in any case where he has had a jury in his charge.

10. Steve is not aware of Detective Flores speaking to any member of the jury at any time. Steve did recall checking the defendant for a warrant with or at the workstation of clerk Sara Johnson, but does not recall if Detective Flores was present when this occurred.

DATED this 12 day of August 2013.

CRAIG L. WATSON
Affiant

STATE OF UTAH)
:ss.
County of Salt Lake)

SUBSCRIBED AND SWORN to before me this 12th day of August 2013.

NOTARY PUBLIC

MELANIE A. HALL
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 02/24/2015
Commission # 606317

Addendum G

August 26, 2013

P R O C E E D I N G S

* * *

Okay. So this is Case No. 121901450. So we have the ruling hearing on this as well. And so I have received documents from both sides. Does any -- do either party believe an evidentiary hearing or anything further is needed?

MR. HILLS: No, your Honor.

MR. HANSEEN: No, your Honor. The Court received the affidavit submitted, I guess, two weeks ago?

THE COURT: Yes, I've reviewed all that and I've received from the State as well.

MR. HANSEEN: So I would submit it on the motion I filed as well as the affidavits.

THE COURT: All right. Thank you. And any objection to the Court taking judicial notice of this door does not lead into a jury room?

MR. HILLS: No, your Honor.

MR. HANSEEN: No.

THE COURT: So the Ccurt will take judicial notice that this door, the one near the jury box, does not lead into a jury room; it leads into a hallway.

So that being determined, the defendant moves to arrest judgment alleging an impropriety at the jury trial, specifically that the State's witness met with the jury. The

witnesses who have prepared affidavits on behalf of the defense have indicated that the witness left with a bailiff through the door, which the jury exits from. No witness testified that he or she witnessed any interaction between the jury and the witness but only by inference and speculation likely surmising that the door by the jury box leads directly into the jury room.

There is no evidence of contact between the witness and the jury, only evidence that the witness utilized the same door that the jury had used. So here, no evidence of unauthorized conduct is present. The witnesses who had direct personal knowledge testified that no contact between the Detective Flores and the jury took place. The witnesses who have personal knowledge indicate that Detective Flores did use the same door as the jury but that he did so to access a computer in the hallway directly outside of that door.

So the Court finds that there's no evidence of improper jury contact that was made, and so there's no presumption, prejudice attaching to that and as such I'm denying the motion.

So we're ready to proceed then with sentencing.

MR. HANSEEN: I believe so.

THE COURT: All right. And so have you had the opportunity to review the presentence report with your client?

MR. HANSEEN: Yes, your Honor.

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES RULING ON MOTION/SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs. DARRYL KENNETH BOSSERT, Defendant.	:	Case No: 121901450 FS Judge: ELIZABETH A HRUBY-MILLS Date: August 26, 2013

PRESENT
Clerk: cyndiav
Prosecutor: VO-DUC, GEORGE F
Defendant
Defendant's Attorney(s): HANSEEN, SAMUEL J
Agency: Adult Probation & Parole

DEFENDANT INFORMATION
Date of birth: December 5, 1961
Sheriff Office#: 100943
Audio
Tape Number: CR W35 Tape Count: 10:28-35

CHARGES
1. ENDANGERMENT OF CHILD OR ELDER ADULT - 3rd Degree Felony
Plea: Not Guilty - Disposition: 05/23/2013 Guilty
2. ENDANGERMENT OF CHILD OR ELDER ADULT - 3rd Degree Felony
Plea: Not Guilty - Disposition: 05/23/2013 Guilty

HEARING

This matter is before the court for a Ruling on the Defendant's Motion to Arrest Judgment, as well as for sentencing.
The court states its ruling on the record. The court finds that there is no evidence that the State's witness had any inappropriate contact with the jury and therefore denies the motion.
The court continues with sentencing.
The court finds some discrepancies in the Pre-sentence Report and orders AP&P to correct them. Namely that the defendant was found guilty of the charges by a jury and did not plead guilty.
Also, that count 3 was not bound over from the preliminary hearing and was therefore dismissed.

SENTENCE PRISON

Based on the defendant's conviction of ENDANGERMENT OF CHILD OR ELDER ADULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of ENDANGERMENT OF CHILD OR ELDER ADULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State

Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Concurrent.

Restitution Amount: $18.00 Plus Interest
Pay in behalf of: VICTIM

Date: Aug 28, 2013

ELIZABETH A HRUBY-MITCHELL
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY